No. _____

In The

SUPREME COURT OF THE UNITED STATES

FRANK AARON ADAMS
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a Certificate of Appealability should have been issued by the Sixth Circuit to resolve one or more of the significant constitutional issues raised by petitioner based on substantial conflicting material facts presented by but decided against him without so much as an evidentiary hearing, in that:

1. The plea colloquy was patently and constitutionally deficient under the mandatory provisions of Rule 11(b)(2) of the Federal Criminal Rules of Procedure ("FRCrProc") due to the district court's complete and abject failure to inquire or determine that petitioner's guilty plea was not coerced and voluntary;
2. Petitioner's plea was in fact coerced by the government threats to prosecute his wife and forfeit her property if he did not plead guilty;
3. Trial counsel was ineffective in failing to prepare for trial, failing to investigate, failing to file necessary motions, and failure to interview witnesses, up to and including the trial date;
4. Trial counsel had a significant conflict of interest in contacting petitioner's wife and legally advising her to forfeit her property or face prosecution;
5. The totality of counsel's performance constituted ineffective assistance of counsel; and
6. The standard of review used by the Sixth Circuit conflicts with the standard used by other Circuits to review the denial of COA's based on guilty pleas?

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Certiorari Should Be Granted and a Certificate of Appealability Issued Because Petitioner Meets the Criteria for a Certificate of Appealability on Based on One or More of His Claims and the Complete Absence of an Evidentiary Hearing, in that:

1. The plea colloquy was patently deficient under FRCrProc. 11(b)(2) because of the district court's complete and abject failure to inquire and determine that the plea was not coerced or otherwise involuntary 5

2. Petitioner's guilty plea was in fact coerced by the government threats to

prosecute his wife and forfeit her property 5

3. Trial counsel. Cornell Price, was ineffective in failing to prepare for trial, failing to investigate, failing to file necessary motions, and failure to interview witnesses up to the trial date;

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On April 2, 2008, without an evidentiary hearing, a controverting affidavit submitted by the government or even oral argument, the United States District Court for the Northern District of Ohio Eastern Division simply filed an Opinion & Order denying Petitioner's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. §2255 [EFC Dkt. # 314, 333, 334]. Reported at *United States v. Frank Aaron Adams*, Slip Copy, 2008 WL 918534 (N.D.Ohio April 2, 2008). Appendix B.

The district court amended and adopted the United States Magistrate Judge's report and recommendation denying petitioner's 28 U.S.C. §2255 motion. *United States v. Frank Aaron Adams*, Slip Copy, 2008 WL 918534 (N.D.Ohio April 2, 2008). Appendix C.

As part of its Opinion and Order, the district court, without any prior notice to the parties, also certified that there was no basis on which to issue a certificate of appealability pursuant to ... 28 U.S.C. §2243(c). [EFC Dkt. # 333, p.14].

On May 30, 2008, petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from the United States District Court's April 2, 2008 Opinion & Order. Appendix C.

Petitioner then filed an Application for Certificate of Appealability (COA) with the United States Court

of Appeals for the Sixth Circuit (Sixth Circuit Court) pursuant to 6 Cir. Rule 22(a)[1/] on the grounds that "the applicant has made a substantial showing of the denial of a constitutional right." Petitioner's Application for COA was subsequently denied by the Sixth Circuit Court in a one page decision. Appendix A..

BASIS OF JURISDICTION

FRAP 22(b)(2) states: "If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

The Sixth Circuit Court denied Petitioner's Application for a Certificate of Appealability on November 10, 2008. This Court's jurisdiction is invoked under *Hohn v. United States*, 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998), and is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth and Sixth Amendments; 28 U.S.C. §2253(c) ; FRAP 22(b); and FRCrProc 11(b)(2), are all set forth in Appendix E.

[1/] "Applications for a certificate of appealability, once denied by the district court, are to be filed in this Court as soon as possible following filing of the notice of appeal."

STATEMENT OF THE CASE AND FACTS

Petitioner made "a substantial showing of the denial of a constitutional right" in his §2255 motion with respect to the his guilty plea in open court and his written plea agreement filed in the district court. Petitioner maintains that the court prejudicially denied petitioner an evidentiary hearing to resolve the factual issues concerning the voluntariness of his plea, the effectiveness of his trial counsel, and the government's threats and promises in coercing his plea and the terms of the plea agreement. Petitioner raised the following issues in his §2255 motion:

1. The plea colloquy was deficient under FRCrProc. 11 because of the District Court's failure to determine that the plea was not coerced.

2. Petitioner's guilty plea was coerced by government threats to prosecute his wife and forfeit her property.

3. Ineffective assistance of counsel for failure to prepare for trial, failure to investigate, failure to file necessary motions, and failure to interview witnesses.

4. Trial counsel's conflict of interest.

5. The totality of counsel's performance constituted ineffective assistance of counsel.

Petitioner therefore sought a Certificate of Appealability from the Sixth Circuit to appeal the

foregoing issues which are explicitly addressed in the district court's decision in denying petitioner's §2255 motion in that he was constitutionally prejudiced by: (1) the totality of trial counsel's ineffectiveness and patent conflict of interest; (2) that his guilty plea was coerced and involuntary; (3) that the government improperly threatened to indict his wife and forfeit her property if he did not sign the plea agreement; (4) that he suffered substantial and injurious effect from the District Court's deficient Rule 11 colloquy at the time of his plea; and (5) that the District Court erred in failing to convene an evidentiary hearing on the factual issues raised by petitioner in his §2255 motion.

Appellant was clearly entitled to an evidentiary hearing based on his claim that the totality of counsel's performance constituted ineffective assistance of counsel. Petitioner stated in his memorandum in support of his §2255 motion which he incorporated by reference as if set forth in full in his petition:

> In this case, either of the three major errors committed by counsel is sufficient, standing alone, to constitute ineffective assistance of counsel. First, Price's failure to bring to the court's attention the nature of the plea agreement and his affirmative action to prevent the court from learning of the terms of the plea agreement that were outside the court's knowledge. Second, the court's lack of knowledge at the time of the plea of the conflict of interest between movant, his wife,

> and therefore counsel. Finally, trial counsel admitted failure in preparing for trial, including his failure to prepare and file motions and his failure to investigate and interview witnesses. Each error prevented movant from entering a knowing and voluntary guilty plea. Certainly, the combination of counsel's errors and omissions fell below the minimum reasonable standard of competence required of criminal defense attorneys and prejudiced movant in this case, because absent the errors, he would not have pleaded guilty.

ECF Dkt. #314, Attach. 1 (Memorandum in Support, pp. 19-20.)

As stated in petitioner's §2255 motion:

> Counsel admitted to the court and to movant that he was not prepared for trial. On the day that trial was to was to begin, counsel coerced movant into entering into a plea agreement that was coercive in nature. Counsel admitted to movant and to the court that he was not prepared for trial and that there were a number of motions, witness interviews and other matters that he knew he should have done, but did not do, in order to properly advise movant. Mr. Price also told movant that there were motions that he should have filed before trial but that he did not have time to do all the things he needed to do prior to

> trial. Mr. Price had failed to interview, as promised, Eddie Ray Washington; Clifford O'Conner, Brian Mapes; Kyle Mapes; Kyle Palmer; Jimmie Johnson; Armando Gonzalez; Robert Jones; Kerwin Bell; and Gary Eppinger's girlfriend. He admitted to movant that he was not prepared to proceed with the trial.

ECF Dkt. #314, p.8

In addition to failing to interview percipient witnesses regarding the alleged offenses, Attorney Price had not subpoenaed any witnesses to the suppression hearing scheduled the day of trial. ECF Dkt. #314, Attach. 1 (Memo in Support, pp. 19.)

> "[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. Id. at 691, 104 S.Ct. at 2066 ('[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.') Thus, we have found counsel to be ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so.

Sanders v. Ratelle, 21 F.3d 1446, 1456-57 (9th Cir. 1994).

Here, counsel failed in his duty to conduct a reasonable investigation or to make an informed decision that makes the particular investigation unnecessary. See *Strickland v. Washington*, 466 U.S. 686, 691 (1984).

In addition, petitioner stated in Ground Three of his motion, quoted above, that his counsel coerced him into entering the plea agreement. As discussed above and in petitioner's Declaration and Tracie Adams' Declaration, petitioner avers that Attorney Price repeatedly conveyed to him that if he pled guilty the government would not indict his wife Tracie Adams. Such representations induced him to plead guilty and not to move to withdraw his guilty plea. First, counsel's failure to disclose to the Court that the plea was entered in consideration of the government's purported promise not to prosecute his wife violated counsel's duty under Rule 11 and was ineffective assistance of counsel as a matter of law. *United States v. Hernandez,* 79 F.3d 1193, 1194 (D.C. Cir. 1996)("The obligation to disclose the terms of a plea agreement is one shared by defense counsel and the prosecutor"); *United States v. Nuckols,* 606 F.2d 566, 570 (5th Cir.1979) (defendant alleged government threatened to indict his wife-- "we concur, that guilty pleas made in consideration of lenient treatment as against third persons pose a greater danger of coercion than purely bilateral plea bargaining.")

Second, if the government never communicated to counsel that it would not indict petitioner's wife if he did plead guilty, counsel was ineffective in misrepresenting the government's plea offer to

petitioner and by falsely inducing petitioner to plead to a 27 year sentence based on a non-existent agreement with the government not to prosecute his wife. If no such agreement was proffered by the government, then Attorney Price's representations to petitioner was clearly ineffective assistance of counsel.

In this case, petitioner presented sufficient evidence to establish that Attorney Price conveyed a government promise not to indict his wife or that Attorney Price misrepresented the Government's promises. Assuming that the Government never made such a promise, petitioner has presented sufficient evidence warranting an evidentiary hearing that counsel was ineffective in falsely representing a non-existent promise by the Government not to indict his wife in order to coerce petitioner to accept the plea agreement thereby enabling counsel to avoid a lengthy trial for which he was admittedly unprepared to proceed as ordered by the District Court.

Thus, the District Court prejudicially erred in denying petitioner an evidentiary hearing on each of the claims raised in his 28 U.S.C. §2255 motion. "The statute [28 U.S.C. §2255] requires a district court to 'grant a prompt hearing' when such motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *Machibroda v. United States*, 368 U.S. 487, 494 (1962). *See United States v. Valentine*, 488 F. 3d 325, 333 (6th Cir. 2007)("In

reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.' *Turner v. United States,* 183 F.3d 474, 477 (6th Cir.1999). '[T]he burden on the petitioner in a *habeas* case for establishing an entitlement to an evidentiary hearing is relatively light.'"); *Arredondo v. United States,* 178 F.3d 778, 782 (6th Cir. 1999)(an evidentiary hearing is required unless "the record conclusively shows that the petitioner is entitled to no relief."); *Blanton v. United States,* 94 F.3d 227, 235 (6th Cir. 1996)(same). "The defendant's burden to show his right to a hearing is significantly lower than his burden to show he is entitled to § 2255 relief. See Turner, 183 F.3d at 477." *Valentine, supra* at 334.

See United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992) ("a motion brought under 28 U.S.C. §2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief"); *Engelen v. United States,* 68 F.3d 238, 240 (8th Cir.1995)(no hearing is required only if the petitioner's allegations "cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact."); *United States v. Blaylock,* 20 F.3d 1458, 1465-69 (9th Cir. 1994) (district court abused its discretion by denying evidentiary hearing on ineffective assistance of counsel claim).

See also Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982) ("a hearing is mandatory whenever the record does not affirmatively manifest the factual or legal invalidity of the petitioner's

claims."); *Anderson v. United States*, 948 F.2d 704, 706 (11th Cir. 1991) (the movant must be accorded an evidentiary hearing unless the motion and the files and records of the case conclusively show that the movant is entitled to no relief); *Murchu v. United States*, 926 F.2d 50, 57 and n. 12 (1st Cir.), *cert. denied* 112 S.Ct. 99 (1991) (movant entitled to hearing, on his allegations that trial judge attempted to coerce guilty plea because allegations "are not conclusory, contradicted by the record nor so inherently incredible as to permit them to be ignored").

In determining whether to conduct a hearing, the Court "must take the defendant's allegations as true except to the extent that they are contradicted by the record." *Mack v. United States*, 635 F.2d 20, 27 (1st Cir. 1980). It may consider affidavits from both sides in deciding whether to hold a hearing, but it may not resolve critical factual questions on the basis of affidavits. *Miller v. United States*, 564 F.2d 103, 106 (1st Cir. 1977).

> "[T]he authority relied on by the district court, *Moss v. United States*, 323 F.3d 445 (6th Cir.2003), does not support its conclusion that a defendant's affidavit alone could not present sufficient evidence supporting his request for a hearing. The Moss district court reached its conclusion only after an extensive three-day hearing on the evidence surrounding the defendant's ineffective-assistance and other claims. *Id.* at 453....[The defendant's] claim may prove false at the evidentiary hearing,

> but it is impossible to assess its veracity based on this record alone. The purpose of the hearing, however, is to allow the court to make these factual determinations based on more than a defendant's affidavit and the contrary representations of the government. Therefore, we reverse the district court's judgment on this issue and remand for an evidentiary hearing on this claim."

Valentine v. United States, *supra* at 334.

> "Day's ineffective assistance of counsel claim raises issues of fact regarding the communications between Day and Mr. Floyd. " 'Where there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.' " *Smith v. United States*, 348 F.3d 545, 551 (6th Cir.2003) (quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir.1999)). An evidentiary hearing was accordingly held on February 29, 2008."

Day v. United States, Slip Copy, 2008 WL 2397664 (W.D. Mich. June 10, 2008).

In the present case, because petitioner's motion and supporting documents raised numerous material factual issues concerning the effective assistance of counsel, defense counsel's representations in his communications to petitioner and his wife regarding an agreement not to indict petitioner's wife if

petitioner pled guilty, and defense counsel's conflicts of interest, there can be no question that an evidentiary hearing was required. *See, United States v. Alexander*, 748 F.2d 185, 193 (4th Cir. 1984) (defendant entitled to a hearing where resolution of factual question is necessary to resolve *Brady* claim).

The District Court reasons in its Opinion and Order that the claims are barred because the Plea Agreement states that petitioner's offer to plead guilty was freely and voluntarily made and petitioner's contention that he was coerced into signing the agreement is contradicted by the record. (Opinion & Order, p. 8.) This conclusion is set forth in the Order which states that the claims lack merit. However, petitioner presented sufficient competent evidence that the government promised not to indict his wife, that Attorney Price misrepresented the government's promises, that Attorney Price conveyed such a promise not to indict Tracie and that a conflict of interest existed. Th district court itself granted a recess after petitioner's counsel indicated that he believed the 27 year sentence in hte plea agreement was too high.[2/]

First, the terms of any agreement is construed against the party that wrote it, which in this case was the government. Second, if the reasoning of the district court is applied without exception, all plea

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[2/] "The Court, after some discussion from defense counsel that he felt the agreed-upon sentence of 27 years was too high, allowed a brief recess where he could confer with his client regarding withdrawing a plea." See Apppendix B-3

agreements using such terminology could never be vacated or set aside on a §2255 motion despite a showing by the petitioner that the plea and the plea agreement was coerced and involuntarily because the showing would necessarily be contradicted by the record. Apart from the statements in the Plea Agreement, there was no evidence filed with the District Court controverting petitioner's Declaration and Tracie Adams Declaration that Attorney Price told them Tracie would be indicted if petitioner did not sign Plea Agreement and that is precisely what the deficient Rule 11 colloquy failed to address in this case.

In petitioner's case, there was a written Plea Agreement but the District Court did not address petitioner in open court regarding the voluntariness of the agreement and the absence of coercion and determine from petitioner's responses that the plea was, in fact, voluntary and not the result of force or threats or promises not set forth in the plea agreement as required b y rule 11. Here, there was a total absence of any direct inquiry by the Court as to voluntariness of the plea and the absence of any coercion. A "core concern" of Rule 11 is determining the absence of coercion. *United States v. Martinez-Molina*, 64 F.3d 719, 733 (1st Cir. 1995); *United States v. Allard*, 926 F.2d 1237, 1244-45 (1st Cir.1991). "[W]e find that the district court failed to conduct a full and direct voluntariness examination in open court, thereby compromising one of Rule 11's 'core concerns' and undermining the validity of their guilty pleas." *Martinez-Molina, supra*, 64 F.3d at 733.

Petitioner does not dispute that he was advised of his rights and understood the nature of the penalty he faced if convicted. However, petitioner indicated that he was dissatisfied with his counsel's representation in his case. (Plea RT 7-12.) Nonetheless, petitioner indicated that he wished to proceed with the plea agreement. Counsel indicated that petitioner had not read the written Plea Agreement but that counsel had summarized each paragraph before petitioner initialed the page. (Plea RT 12-13.) Although ¶ 36 of the agreement states that the plea is free and voluntary, the Rule 11 colloquy in court did not reference that paragraph nor was there any statement that all the statements in the agreement were true and correct or that it included every promise or representation the government had made. In fact, ¶ 36 immediately follows the last sentence of ¶ 35 that states petitioner believes he has received the effective assistance of counsel which he disputed in open court. (*See* ECF Dkt. 241, Plea Agreement p. 16; Plea RT 7-12.)

As set forth in his pleadings and submissions with respect to his §2255 motion, petitioner presented his Declaration and Tracie Adams' Declaration which asserted that Attorney Price conveyed to him and his wife that if he accepted the 27 year plea offer the government would not indict Tracie. Further, the agreement not to prosecute was plainly outside of the plea agreement and not brought to the Court's attention based on Attorney Price's advice. However, petitioner asserted in his 2255 motion that if a full Rule 11 colloquy had occurred in which the Court had addressed petitioner and inquired if the plea was

voluntary and not the result of coercion or promises not set forth in the Plea Agreement, the District Court would have ascertained that such a promise had been conveyed to petitioner by his counsel and that he had been coerced into taking the plea rather than proceeding with the trial.

Consequently, the Plea Agreement's representation that the plea was voluntary was a product of that coercion as well as the agreement's waiver of petitioner's appellate rights, including the waiver of his right to file a §2255 motion except on the basis of ineffective assistance of counsel or prosecutorial misconduct. *See Davila v. United States*, 258 F.3d 448, 450-451 (6th Cir. 2001)(to be valid waiver the defendant must enter into the waiver agreement knowing, intelligently, and voluntarily.) Consequently, petitioner cannot be bound by the terms of the plea agreement and since the coercion was dehors the record it could not have been raised in an appeal in any event and is properly raised in this §2255 motion. *Waley v. Johnston*, 316 U.S. 101, 104, 62 S.Ct. 964 (1942) (*per curiam*); *Fontaine v. United States*, 411 U.S. 213 (1973).

Further, as discussed above, to the extent that there was no promise made by the government not to indict Tracie Adams if petitioner pled, but such a representation was made to him by Attorney Price, such a false representation by his counsel coerced petitioner to accept the plea and the colloquy was constitutionally deficient in that a proper Rule 11 colloquy would have established that the plea was coerced as a product of his counsel's deception. Petitioner contends that he has made "a substantial

showing of the denial of a constitutional right" and these issues are worthy of consideration by a reviewing court.

In addition, it is fundamentally unfair under the Due Process Clause of the Fifth Amendment , that the district court may resolve conflicting facts based on its own recollection of events *alone*, without an evidentiary hearing regarding its own deficient Rule 11 colloquy or supporting affidavits by the government, has never been considered by the Court, particularly when material facts presented by the petitioner are outside of the trial record. It clearly smacks of a biased tribunal rationalizing its own overt errors without a clear factual basis.

6. Conflict with other circuits on standard of review used by Sixth Circuit

Finally, the standard of review used by the Sixth Circuit in denying petitioner's application for COA, (Appenix A, p. A-3) is in conflict with the plain error standard used by other United States Circuit Courts of Appeals. *Cf. United States v. Borrero-Acevedo*, 533 F.3d 11, 18 (1st Cir. 2008)("Some courts have held that where there is no discussion of an appellate waiver clause at the plea hearing and there is an absence of 'any indication on the record that the defendant understood that he had a right to appeal and he was giving up that right,' that will suffice to satisfy the third prong of the plain error test. *Murdock*, 398 F.3d at 497; see also *Arellano-Gallegos*, 387 F.3d at 797 (same). This view is, we think, inconsistent with both *Vonn* and *Dominguez*

Benitez.") As indicated in *Borrerro-Acevedo*, only the Ninth Circuit in *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir.2004) is in accord with the standard on review employed by the Sixth Circuit following this Court's decisions in *Vonn* and *Dominguez Benitez*.[3/]

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the decision of the United States Court

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[3/] We apply, for the first time, the Supreme Court's recent plain error decisions to a defendant's unpreserved claim of Rule 11(b)(1)(N) error as to a waiver of appeal clause at the change-of-plea hearing. See *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004); *United States v. Vonn*, 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).....

In doing so, we join the other circuits to have considered the question and hold that the plain error standard applies to unpreserved claims of violations of Fed.R.Crim.P. 11(b)(1)(N), albeit our understanding of the plain error rule seems to differ from some. See, e.g., *United States v. Murdock*, 398 F.3d 491, 496 (6th Cir.2005); *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir.2004).

Borrero-Acevedo, supra, 533 F.3d. at 13.

of Appeals for the Sixth Circuit and directing the Sixth Circuit to issue a Certificate of Appealability granting him leave to pursue the issues described above in his appeal from the denial of his 2255 motion by the district court.

Dated: February 9, 2009

Respectfully submitted,

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APPENDIX A

NO. 08-3727

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK AARON ADAMS, Petitioner-Appellant

vs.

UNITED STATES OF AMERICA, Respondent-Appellee.

ORDER

FILED: November 20, 2008

Frank Aaron Adams appeals a district court order denying his motion to vacate his sentence filed pursuant to 28 U.S.C. § 2255. Adams has filed an application for a certificate of appealability under Fed. R. App. P. 22(b).

In 2005, Adams pleaded guilty to conspiring to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841; and conducting financial transactions from the proceeds of that illegal activity, in violation of 18 U.S.C. §§ 1956 and 2. The plea agreement set forth a joint recommendation for a twenty-seven year sentence that bound the court to impose that sentence. As part of the plea agreement, Adams waived his right to appeal or collaterally challenge his conviction or sentence, except to challenge a sentence in excess of the maximum sentence, to challenge a sentence in excess of the

applicable guidelines range, to challenge counsel's ineffective assistance, or to challenge prosecutorial misconduct. The district court imposed the agreed upon sentence. Adams did not file a direct criminal appeal.

In March 2007, Adams filed a § 2255 motion, arguing that: 1) the plea colloquy was deficient because the district court failed to determine if his plea was coerced; 2) the government threatened him with prosecution of his wife, thereby coercing him to plead guilty; 3) his counsel rendered ineffective assistance by failing to properly prepare for trial by investigating, filing required motions, or interviewing witnesses; and 4) his counsel acted under a conflict of interest by representing Adams's wife. Upon review, a magistrate judge filed a report, concluding that Adams had waived his right to collaterally challenge his conviction and sentence, that he had procedurally defaulted his claims, and that the claims lacked merit. Hence, he recommended that the district court deny the § 2255 motion. Adams filed objections, and the government moved to strike the objections as untimely. After concluding that Adams's objections were timely, the district court rejected the objections, and adopted the magistrate judge's recommendation to dismiss the § 2255 motion.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Adams fails to make the requisite showing. First, Adams waived his right to raise his claims numbered 1 and 2 above. The parties reviewed the terms of the plea agreement in open court, and

Adams acknowledged that he understood the terms of the plea agreement. There is nothing in the record to suggest that Adams's assent to the express waiver provision was invalid. Under these circumstances, Adams's waiver is valid. See *United States v. Murdock*, 398 F.3d 491, 496-99 (6th Cir. 2005). Nonetheless, even if the waiver is invalid, Adams has not made a substantial showing of the denial of a constitutional right. This court has held that, a plea entered in exchange for a promise not to prosecute a third party is permissible if the government had probable cause to prosecute the third party. See *Doe v. United States*, 85 F.3d 628, 628 (6th Cir. 1996).

Second, Adams did not make a substantial showing that counsel rendered ineffective assistance. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Adams did not establish any prejudice from counsel's alleged failure to investigate the case. Adams failed to identify any exculpatory or impeachment evidence that counsel could have discovered. In addition, Adams's wife's affidavit reflects that counsel was not representing her during the proceedings. Furthermore, during the plea hearing, Adams rejected the district court's offer to appoint new counsel before he entered his guilty plea.

Accordingly, the application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES, Plaintiff,

vs.

FRANK AARON ADAMS, Defendant.

CASE NO. 1 :05-CR-00126-JG

FILED: April 2, 2008

OPINION & ORDER

[Resolving Doc. No. 314, 331]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

This case is before the Court on the Petitioner's motion to vacate his sentence and the government's motion to strike his objections to the magistrate's report and recommendation. [Docs. 314, 331]. For the reasons stated below, the Court DENIES both motions.

I. Background

On November 14, 2005, the Petitioner Frank Aaron Adams, pursuant to plea agreement, pled guilty in this Court to conspiring to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(a), and conducting financial transactions from the proceeds of that illegal activity, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 2. [Doc.

233]. The United States agreed to move for the dismissal of the other pending charges. [Doc. 241]. The plea agreement also set out a joint recommendation of a 27-year sentence to the Court, and bound the Court to impose this sentence, pursuant to Criminal Rule 1 1(c)(1)(C). [Doc. 241 at 4-5]. As a term of the plea agreement, Petitioner waived his appellate rights, including the right to file a petition under 28 U.S.C. § 2255, except for: a challenge to a sentence in excess of the maximum sentence; a challenge to a sentence in excess of the applicable Sentencing Guideline range; and claims of ineffective assistance of counsel or prosecutorial misconduct. [Doc. 241 at 10]. The Petitioner also agreed to forfeit his interest in several pieces of property, including some jointly owned with his wife. [Doc. 241 at 13-15]. His wife also executed a document, agreeing to forfeit interest in these assets. The plea agreement stated that his offer to plead guilty was freely and voluntarily made and that no threats, promises, or representations had been made, nor agreements reached, other than those set forth in the plea agreement to induce him to plead guilty. [Doc. 241 at 16].

At the plea hearing, the Petitioner indicated he was unhappy with the representation afforded to him by counsel. [Doc. 312 at 7-12]. The Petitioner indicated that he was unhappy with counsel for two reasons: his counsel had failed to approach prosecutors earlier so as to better qualify him for a potential reduction of his criminal sentence for substantial assistance. He also says that his trial counsel had not adequately prepared for trial. The Court asked the Petitioner if he would still like to

plead guilty, to which the Petitioner responded he would. [Doc. 312 at 11]. The Court asked whether the Petitioner wanted other counsel appointed to advise him on the plea, to which the Petitioner responded "No, we can just finish this up, Your Honor." [Doc. 312 at 12].

Petitioner Adams pled guilty after the ground had shifted, to his detriment, when nearly all his co-conspirators pled guilty and agreed to testify against him. With their agreements to testify against him, much of Adams' defense had fallen away. As the last defendant standing, the value of any cooperation that Adams could offer had greatly diminished. At the plea hearing, Adams suggested that his trial counsel had neglected efforts to approach prosecutors under an ill-advised assumption that co-defendants would not plead guilty and offer testimony against Adams.

On February 15, 2006, the Court held a sentencing hearing and sentenced Petitioner to the agreed upon 324 months or 27 years of imprisonment. [Doc. 283, 285]. Attorney Price remained the Petitioner's attorney, but the Petitioner did not raise Attorney Price's purported ineffectiveness at any time during the sentencing hearing. The Court, after some discussion from defense counsel that he felt the agreed-upon sentence of 27 years was too high, allowed a brief recess where he could confer with his client regarding withdrawing a plea. The plea agreement, pursuant to Rule 11(c)(1)(C), left the Court no discretion to sentence

the Petitioner to any other term. [Doc. 241 at 4-5].[1/] After the recess, Attorney Price represented to the Court that after speaking with Adams, the defendant would not move to withdraw his plea and proceed with the current plea agreement. [Doc. 298, at 17]. The Court sentenced the Petitioner to 27 years, consistent with the plea agreement. [Doc. 298]. The Petitioner did not file a direct appeal.

On March 2, 2007, the Petitioner Frank Aaron Adams filed a motion to vacate his sentence, pursuant to 28 U.S.C. § 2255. [Doc. 314]. The Petitioner raises four grounds for relief:

I. THE PLEA COLLOQUY WAS DEFICIENT UNDER RULE 11 FOR THE COURT'S FAILURE TO DETERMINE THAT THE PLEA WAS NOT COERCED.

II. MOVANT' S GUILTY PLEA WAS COERCED BY GOVERNMENT THREATS TO PROSECUTE MOVANT'S WIFE AND FORFEIT HER PROPERTY.

III. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PREPARE FOR TRIAL, FAILURE TO INVESTIGATE, FAILURE TO FILE NECESSARY MOTIONS, FAILURE TO INTERVIEW WITNESSES.

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1 The plea agreement states: "the Defendant understands that, if the Court accepts this plea agreement, the Court has agreed to be bound by the parties recommendation that a particular sentence, 27 years, is appropriate in this case." [Doc. 241 at 4]

IV. TRIAL COUNSEL'S CONFLICT OF INTEREST.

[Doc. 314].

On March 12, 2007, the Court referred the motion to Magistrate Judge George J. Limbert for a report and recommendation. [Doc. 317]. On December 26, 2007, Magistrate Limbert issued a report and recommendation suggesting this Court deny the motion. [Doc. 329]. The Petitioner Frank Aaron filed an objection on January 14, 2008. [Doc. 330]. The United States moves to strike the objection as untimely. [Doc. 331].

II. Legal Standard

A. Section 2255 Petitions

Four grounds exist upon which federal prisoners may challenge their conviction or sentence pursuant to 28 U.S.C. § 2255:

1. 1. That the sentence was imposed in violation of the Constitution or laws of the United States;
2. That the court was without jurisdiction to impose such sentence;
3. That the sentence was in excess of the maximum authorized by law;
4. That the sentence is otherwise subject to collateral attack.

United States v. Hill, 368 U.S. 424. 426-27 (1962); 28 U.S.C. § 2255. To prevail on a § 2255 motion alleging constitutional error, the prisoner must establish the existence of the error and that it had a substantial

and injurious effect or influence on the proceedings. *See*, e.g., *United States v. Watson*, 165 F.3d 486, 488 (6th Cir. 1999). To prevail on a § 2255 motion alleging non-constitutional error, the Petitioner must establish a "fundamental defect which inherently results in a complete miscarriage of justice, or, an error so egregious that it amounts to a violation of due process." *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir.1990).

The Court can summarily deny a motion to vacate if it plainly appears from the face of the motion and any annexed exhibits that the movant is not entitled to relief. *Smith v. United States*, 348 F.3d 545, 550 (6th Cir. 2003). Otherwise, the Court must hold an evidentiary hearing to determine the truth of movant's claims. *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007). A § 2255 petitioner's "burden 'for establishing an entitlement to an evidentiary hearing is relatively light.'" *Smith*, 348 F.3d at 550. Nevertheless, the Court need not hold a hearing if the movant's allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact. *Valentine*, 488 F. 3d at 333.

B. Procedural Default and Waiver

Except for a claim of ineffective assistance of counsel, a federal prisoner's failure to raise a claim on direct appeal results in a procedural default of that claim. *Bousley v. United States*, 523 U.S. 614, 621 (1998); *Peveler v. United States*, 269 F.3d 693,

698 (6th Cir. 2001). For a federal prisoner to obtain review of a defaulted claim in a § 2255 motion, he must show both cause that would excuse his failure to raise the claim previously and actual prejudice from the alleged violation. *Bousley*, 523 U.S. at 622; *Peveler*, 269 F.3d at 698-700. If the prisoner fails to establish cause, the Court need not determine if he was prejudiced by the alleged violation. *Bousley*, 523 U.S. at 623. If unable to show cause and prejudice, the prisoner may still be able to obtain review of his claims if his case fits within a narrow class of cases permitting review in order to prevent a fundamental miscarriage of justice, as when he submits new evidence showing that a constitutional violation has probably resulted in a conviction of one who is actually innocent. *Bousley*, 523 U.S. at 622-23.

A petitioner may waive his right to bring a § 2255 motion. A petitioner's knowing and voluntary waiver of his right to pursue collateral relief in a plea agreement will preclude his ability to file a subsequent § 2255 motion. *Davila v. United States*, 258 F.3d 448, 450 (6th Cir. 2001).

C. The Federal Magistrate Act

The Federal Magistrates Act requires a district court to conduct a de novo review only of those portions of a Report and Recommendation to which the parties have made an objection. 28 U.S.C. § 636(b)(1). Parties must file any objections to a Report and Recommendation within ten days of service. Failure to object within that time waives a party's right to appeal the magistrate judge's recommendation. FED. R. CIV. P. 72(a); *see Thomas*

v. Arn, 474 U.S. 140, 145 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Absent objection, a district court may adopt the magistrate's report without review. *Thomas*, 474 U.S. at 149.

In regards to the time a petitioner has to file his or her objections, Rule 6 of the Federal Rules of Civil Procedure provides:

> (a) In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. FED. R. CIV. PRO. 6(A).

III. Analysis

A. Motion to Strike

The clerk mailed the report and recommendation on Friday, December 27, 2007 [Doc. 332, Ex. 1]. Pursuant to FED. R. CIV. PRO. 6(A), the Court begins counting on the following Monday, December

31, as weekends are excluded.[2/] The Court skips New Year's Day, which is a legal holiday, and counts nine more days, skipping weekends. The tenth day is January 14. The objections, therefore, are timely, and the Court will deny the motion to strike them as untimely.

B. Objections to the Report and Recommendation

The petitioner objects to the report and recommendation on several grounds. He objects to the Magistrate Judge's finding that the United States never threatened to prosecute his wife, Tracie Adams, and he argues that this question requires an evidentiary hearing. Next, he objects to the Magistrate Judge's finding that his attorney did not operate at a conflict of interest because his attorney did not represent his wife. He further objects to the Magistrate Judge's finding that the plea colloquy was not deficient. He also objects to the Magistrate Judge's finding that his counsel was not ineffective in his failure to investigate and prepare for trial. He finally objects, stating, the totality of the circumstances illustrate that his counsel was ineffective–both in his failure to prepare and in his operating at a conflict of interest in representing himself and his wife. The Court will first consider the Petitioner's arguments regarding government misconduct, then his ineffective assistance of counsel

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2/ The Court was closed on December 31, 2007. Petitioner Adams argues that the Court should therefore not count this day, but as the objections are timely regardless of whether the Court counts this day, the Court will not address this issue.

arguments. Finally, the Court will consider the alleged deficiencies in the plea colloquy. 1. Petitioner's Challenges to his Plea due to Alleged Threats

In his petition, the Petitioner alleges that the United States threatened to prosecute his wife unless the Petitioner pled guilty. Magistrate Limbert recommended that this Court dismiss this ground as contradicted by the record. The plea agreement states: "The defendant acknowledges that his offer to plead guilty is freely and voluntarily made and that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Plea Agreement, to induce him to plead guilty." [Doc. 241 at 16]. Moreover, both Attorney Price and Special Assistant U.S. Attorney Hendrickson signed the Plea Agreement as officers of the Court, representing that no outside threats or promises had been made to induce Petitioner to plead guilty. [Doc. 241 at 17-18]. Further, Attorney Price signed a statement, incorporated in the Plea Agreement, that states: "No assurances, promises, or representations have been given to me (defense counsel) or the defendant by the United States or by any of its representatives which are not contained in the written agreement." [Doc. 241 at 17].

The Petitioner argues that an evidentiary hearing is necessary to resolve these issues. The Court finds, however, that these issues are contradicted by the record, and therefore no evidentiary hearing is necessary. *Valentine*, 488 F.3d at 333. Specifically, the Petitioner, AUSA Hendrickson, and Attorney Price all represented to the Court that there were no threats or promises outside the plea agreement.

Furthermore, the Court finds that even if the United States threatened to indict the Petitioner's wife, this did not make his decision to plea involuntary. While the Supreme Court has reserved judgment on the voluntariness of a plea entered in exchange for a promise not to prosecute a third party, the Sixth Circuit has held that such a plea agreement is permissible if the government had probable cause to prosecute the third party, but impermissible otherwise. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978); *Doe v. United States*, 85 F.3d 628 (6th Cir. 1996) (table). In this case, the United States had several wiretaps that suggest the Petitioner's wife knew what the Petitioner was selling cocaine and that she had conducted financial transactions to hide the source of the proceeds from cocaine sales. As such, the United States had probable cause to pursue an indictment of her. Therefore, any threats that the government would indict her if the Petitioner did not plead guilty did not cause an involuntary plea. *See Doe*, 85 F.3d 628.

2. The Petitioner's Ineffective Assistance of Counsel Claims

To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the proceedings unfair and the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Bigelow v. Williams*, 367 F.3d 562, 570 (6th Cir. 2004). A reviewing court's scrutiny of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689.

Indeed, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *accord Bigelow*, 367 F.3d at 570.

Nonetheless, the court must make an independent judicial evaluation of counsel's performance to determine whether counsel acted reasonably under all the circumstances. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("the relevant question is not whether counsel's choices were strategic, but whether they were reasonable"). The court's position in *Strickland* emphasizes that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations." 466 U.S. at 690.

In assessing the second prong of the *Strickland* test, whether the deficient performance prejudiced the defense, a court must determine whether "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. This requires a finding beyond a mere showing that "the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test." *Williams*, 529 U.S. at 394 (citing *Strickland*, 466 U.S. at 693). When a petitioner pleads guilty, he "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead would

have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

a. His Attorney's Alleged Ineffectiveness for Representing him while under a Conflict of Interest

The Petitioner alleges Attorney Price was ineffective in that he represented both the petitioner and the petitioner's wife, Traci Adams. He attaches an affidavit from Traci Adams.[3/] Magistrate Judge Limbert found the affidavit demonstrated that his wife did not believe Attorney Price was her counsel. The Petitioner objects to that finding, arguing that "Attorney Price advised that she had to sign off on the property for Frank 'because of California community property laws' and that she relied on his advice that she did not need an attorney and 'signed over the property at his recommendation.'" [Doc. 330 at 4; 314 at 26]. The Magistrate Judge based his recommendation on the portion of the affidavit in which Adams declared that she had asked Attorney Price whether she needed a lawyer. The Magistrate Judge found that this question showed that Adams did not believe Attorney Price was her own lawyer. The Court finds that the Petitioner has not established prejudice. Even if the Petitioner's wife believed that Attorney Price also represented her in his obtaining the release for the property, this did not prejudice the Petitioner. Attorney Price's obtaining

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3 The affidavit is unattested. The Court will presume for the purposes of argument that the affiant is Petitioner's Adams.' For these reasons, the Petitioner cannot establish any prejudice to Petitioner.

his wife's consent to forfeit her interest in the property did not cause the Petitioner to plea. And Attorney Price's advice to Traci Adams that she need not obtain an attorney only worked to benefit the Petitioner. Thus, even if Attorney Price was also representing Traci Adams, which the Court assumes but does not find, this did not affect the Petitioner's rights. In fact, both Petitioner's and Traci Adams' statements support the contention that Attorney's Price was advocating for the Petitioner's interests, and not Traci

b. His Counsel's Alleged Ineffectiveness for Failing to Investigate and Prepare for Trial

The Magistrate Judge recommends this Court find Attorney Price not ineffective in his failure to investigate and prepare for trial because the Petitioner has not demonstrated prejudice. The Petitioner objects to this finding, arguing both that his counsel made unprofessional errors and that he would not have pled guilty had his counsel not made those errors and conveyed to him that the United States would indict his wife if he did not plea guilty.

The Petitioner again fails to establish prejudice. In regards to his argument that he would not have pled guilty if not for his understanding that the United States had threatened to indict his wife, this did not render his plea involuntary. *See Doe*, 85 F.3d 628. As such, the Court finds that if his attorney conveyed this threat, it was neither deficient representation nor prejudicial.

As to his counsel's alleged errors for failing to investigate by interviewing witnesses and

preparing for trial, the Petitioner cannot establish that had his counsel investigated, he would not have pled guilty. The Petitioner fails to point to any exculpatory or impeachment evidence that his counsel would have found, had he interviewed witnesses and done further investigation. Recall, Adams position deteriorated because nearly all co-defendants agreed to testify against him. It is nowhere clear how any lack of investigation could have helped Adams deal with this. At the plea colloquy, after the Petitioner indicated he was unhappy with his counsel's representation in his failure to investigate and prepare, his counsel indicated that even had he prepared by interviewing witnesses and filing motions to suppress the evidence, the Petitioner's co-conspirators had agreed to testify against him. There was plenty of evidence to convict him in an ensuing trial.

Moreover, the Court inquired whether the Petitioner would like to change counsel and not proceed with his plea of guilty. But the Petitioner insisted that "we can just finish this up." [Doc. 233 at 12]. Presumably, if his counsel's failure to prepare for trial coerced the Petitioner into agreeing to plea guilty, he would have accepted the Court's offer to change counsel and re-evaluate whether to plea guilty. Furthermore, the Court gave the Petitioner a chance to consider making a motion to withdraw his plea at the sentencing hearing when his attorney expressed chagrin at the agreed-upon 27 year sentence. The Court recessed, and the Petitioner conferred with his Attorney and decided again not to try to change the plea but to go forward with the sentence. [Doc. 298 at 17].

Furthermore, the Petitioner's main contention at the plea hearing was *not* that his attorney was ineffective for failing to prepare–it was that he felt his attorney should have *earlier* made an offer to plea guilty. The Petitioner indicated that he was upset because of the length of his potential sentence as opposed to other defendants in the same case that received substantial assistance points. He indicated to the Court that he would have given assistance to the prosecution in exchange for such a deal, had his attorney offered. This further demonstrates that his attorney's alleged errors were not the reason he pled guilty.

The Court, therefore, does not find a reasonable probability that, but for his counsel's errors, the Petitioner would not have pled guilty.

c. The Totality of Circumstances and his Ineffectiveness of Counsel Claim

The Petitioner further objects that Magistrate Limbert failed to evaluate the totality of his counsel's deficiencies in assessing prejudice. The Court has found that even if Attorney Price represented both the Petitioner and his wife, any conflict of interest worked to benefit the Petitioner. The Court has further found that there is no evidence to suggest that Attorney Price's failure to investigate and prepare for trial caused the Petitioner to plead guilty. The Court gave Petitioner a chance to change counsel and re-evaluate his decision to plea guilty, he did not take it. When considering these alleged errors together, the Court finds there is no evidence that these deficiencies together caused the Petitioner to

plead guilty. Rather, the Court notes that the Petitioner indicated he wished to have plead guilty *earlier*. Therefore, the Court finds no prejudice. *See Hill*, 474 U.S. at 59.

3. The Alleged Deficiencies of the Plea Colloquy

The Petitioner challenges his plea, arguing that his plea was involuntary. He alleges that the plea colloquy was deficient in that the Court did not ask the Petitioner whether there were any outside threats or promises that were not stated in the plea agreement. Magistrate Limbert recommends that this Court find his claim both is procedurally barred and lacks merit. The Petitioner objects to these recommendations.

The Court agrees with the magistrate's recommendation that the Court find this claim is barred. Petitioner signed a plea agreement waiving his right to attack his conviction on a 28 U.S.C. § 2255 motion except for challenges to a sentence in excess of the maximum sentence or the applicable Sentencing Guideline range or for claims of ineffective assistance of counsel or prosecutorial misconduct. [Doc. 241 at 10]; *see Davila*, 258 F.3d at 450; *Watson*, 165 F.3d at 488-89. While such a waiver must be knowingly and voluntarily made, the Petitioner carries the burden of showing involuntariness. *See Bousley*, 523 U.S. at 618-19. As discussed above, the Petitioner has failed to do so in this case. Moreover, the Court finds the Petitioner's claims fail.

The Petitioner has the burden of establishing that a deficiency in the Court's colloquy had a substantial

and injurious effect or influence on the proceedings. *See* Bousley, 523 U.S. at 618-19. The Petitioner argues that the injurious effect was the Court's failure to learn of the government's coercion–therefore taking an involuntary plea. As discussed above, threats to indict family members, where the prosecution had probable cause to indict those family members, does not render a plea involuntary. *See Doe*, 85 F.3d 628. As such, this position lacks merit. Had the Court learned of the alleged threats, it would not have affected the proceedings.

The Petitioner also contends that his attorney's alleged ineffectiveness and conflict of interest caused the substantial and injurious effect in the proceedings. The Court has already found that the Petitioner has failed to show that but for his attorney's alleged conflict of interest, he would not have pled guilty. Moreover, the Petitioner indicated his unhappiness with his attorney's lack of preparation at the plea hearing. The Court gave the Petitioner the opportunity to not proceed with the plea and seek advice from other counsel, the Petitioner declined the opportunity and indicated he wished to proceed with the plea. Therefore, the Court finds no substantial and injurious effect on the plea proceedings.

IV. Conclusion

For the reasons stated above, the Court AMENDS and ADOPTS the magistrate's report and recommendation. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3) that an appeal

from this decision could not be taken in good faith, and no basis exists on which to issue a certificate of appealability. 28 U.S.C. §2243(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: April 2, 2008

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK AARON ADAMS, Defendant,

vs.

UNITED STATES, Respondent.

CASE NO. 1 :05-CR-00126-JG
December 26, 2007

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

GEORGE J. LIMBERT, United States Magistrate Judge.

On March 2, 2007, Petitioner Frank Aaron Adams ("Petitioner"), a federal prisoner currently incarcerated at FCI Victorville, California filed a motion, through counsel, under 28 U.S.C. § 2255 in order to vacate, set aside, or correct his sentence. Electronic Court Filing Docket # 314 (hereinafter "ECF Dkt." to refer to filings in Case Number 1:05CR00126). On August 17, 2007, Respondent United States of America ("Respondent") filed a brief in opposition to the motion. ECF Dkt. # 325. On November 7, 2007, Petitioner filed a reply brief. ECF Dkt. # 328. The Honorable Judge James S. Gwin

referred the instant case to the undersigned for a Report and Recommendation. ECF Dkt. # 317.

For the following reasons, the undersigned recommends that the Court DENY Petitioner's § 2255 motion. ECF Dkt. # 314.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Guilty Plea

On March 16, 2005, a federal grand jury returned a 42-count indictment against Petitioner and nine co-defendants ("Indictment"). ECF Dkt. # 1. On November 14, 2005, Petitioner, represented by trial counsel, Cornell Price ("Attorney Price"), entered a plea of guilty to Counts 1 and 41 in the Indictment. ECF Dkt. # 233, 241. Under the terms of a written plea agreement dated November 14, 2005, Petitioner admitted to violations of 21 U.S.C. § 846 and 18 U.S.C. § 1956(a)(1)(B)(I) ("Plea Agreement"). ECF Dkt. # 241. Petitioner admitted the following facts through the Plea Agreement:

27. In the Fall of 2002, an investigation commenced in Cleveland, Ohio, based upon evidence derived from various sources regarding an ongoing drug distribution network with the source of cocaine supply originating in Los Angeles, California. The Federal Bureau of Investigation (FBI) in Cleveland consequently began a Title III wiretap on July 29, 2004.28. The investigation revealed that the defendant, along with Juan Mendoza, arranged to

obtain kilogram quantities of cocaine hydrochloride in the Los Angeles, California, area during the years 2000 through 2004.

29. During the years 2000 through 2004, the defendant regularly supplied kilogram quantities of cocaine to Cleveland area narcotics traffickers, including, among others, Jerk (Jimmie Mitchell), Roland (Roland Smith), G (Gary Eppinger), Dre (Andre Jenkins), Nate (Nathaniel Thompson) and Bree (Aubrey Benjamin).

30. During the course of the conspiracy, the kilogram quantities of cocaine would be delivered by different methods to the Northern District of Ohio. Initially, the cocaine was transported in automobiles from Los Angeles to Cleveland. Later, as the quantities of cocaine increased, the defendant arranged to have his uncle (Eddie Ray Washington) transport the narcotics in his semi-truck.

31. During the course of the conspiracy, defendant arranged for Julena Bums to receive proceeds from the sale of cocaine on his behalf.

32. On or about September 6,2003, in the Northern District of Ohio, the defendant, did knowingly conduct financial transactions affecting interstate commerce, that is, the transfer, delivery and movement of approximately $9,500, by wire and other means, which was applied toward the purchase of a 2003 Chevrolet Van which he titled in the name of another individual, which transactions involved the proceeds of some form of unlawful activity,

knowing that the transactions were designed, in whole or in part, to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of a specified unlawful activity; and that while conducting and attempting to conduct such financial transactions, knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, that is, conspiracy to distribute and possess with the intent to distribute controlled substances, in violation of Title 21, Sections 846 and 841(a)(l).

33. The investigation revealed that the defendant was reasonably and foreseeably responsible for 150 kilograms or more of cocaine hydrochloride, a Schedule II controlled substance.

Id. at 11-13. Petitioner and Respondent agreed to jointly recommend a 27-year sentence to the Court. *Id.* at 5. As a term of the Plea Agreement, Petitioner waived his appellate rights, including the right to file a petition under 28 U.S.C. § 2255, except for: a challenge to a sentence in excess of the maximum sentence; a challenge to a sentence in excess of the applicable Sentencing Guideline range; and claims of ineffective assistance of counsel or prosecutorial misconduct. *Id.* at 10.

As an additional term of the Plea Agreement, Petitioner agreed to forfeit his interest in:

1. 830 East Terrace Drive, Long Beach, California (Permanent Parcel No. 7135-005-015);

2. $25,000.00 in U.S. Currency seized pursuant to a search warrant on November 4, 2004, from a tractor trailer on Interstate 71 South, mile marker 188, Ashland County, Ohio;

3. Contents [approximately $32,018.52] of Account # 463052 at WesCom Credit Union;

4. 2003 Chevrolet Van, VIN: 1GBFG15T131135814;

5. Glock .40 cal. Model 27, Serial # DXK281, seized on March 22, 2005, at 830 East Terrace Drive, Long Beach, California;

6. $17,000.00 in U.S. Currency seized on March 22, 2005, at 830 East Terrace Drive, Long Beach, California;

7. Contents [$11,548.52] of WesCom Credit Union (Los Angeles, California), Free Checking Account # 254929 Sub Account 09, seized on September 1, 2005; and

8. 1637 West 69th Street, Los Angeles, California (Assessor's Parcel Number 6015-022-006).

ECF Dkt. # 241 at 13-15.

Petitioner acknowledged through the Plea Agreement that his offer to plead guilty was freely and voluntarily made and that no threats, promises, or representations had been made, nor agreements reached, other than those set forth in the Plea Agreement to induce him to plead guilty. ECF Dkt. #

241 at 16. Attorney Price submitted a statement declaring that no assurances, promises, or representations had been given to him or Petitioner by the United States or by any of its representatives which were not contained in the Plea Agreement. *Id.* at 16-17.

At the change of plea hearing, Judge Gwin asked if Petitioner had any complaints regarding Attorney Price's representation. Nov. 14, 2005 Change of Plea Hearing Transcripts ("COP Tr.") at 7. Petitioner said he was not satisfied because he believed Attorney Price did not pursue certain defenses, including a motion to suppress evidence seized during a stop in Oklahoma and a motion to suppress evidence obtained through wiretaps. *Id.* at 7-8. Attorney Price stated that even if he had pursued every defense, Petitioner would not have been in any better of a position because a number of co-conspirators had since agreed to testify against him. *Id.* at 8-9. Attorney Price further stated that he believed Petitioner was dissatisfied because he had not asked for a deal with the Government soon enough and allowed the co-conspirators to negotiate more favorable terms in their plea agreements. *Id.* at 9-10. Following Petitioner's complaints, Judge Gwin asked Petitioner if he wanted to proceed with his change of plea, and Petitioner said he did. *Id.* at 11-12. Judge Gwin asked Petitioner if he wanted the Court to appoint other counsel, and the Petitioner said, "No, we can just finish this up, Your Honor." *Id.* at 12. Following that exchange, Attorney Price stated on three separate occasions that Petitioner was reserving his right to challenge his conviction

collaterally based on a claim of ineffective assistance of counsel. *Id.* at 12, lines 7-11; 21, lines 7-11; 26, lines 5-10.

Following the Court's colloquy, Petitioner entered a plea of guilty to Counts 1 and 41 of the Indictment. COP Tr. at 31-32.

B. Sentencing

On February 15, 2006, Judge Gwin held a sentencing hearing and sentenced Petitioner to 324 months (27 years) of imprisonment. ECF Dkt. # 283, 285; February 15, 2006 Sentencing Hearing Transcripts ("SH Tr."). Petitioner was still being represented by Attorney Price but did not raise Attorney Price's purported ineffectiveness at any time during the sentencing hearing. *See* SH Tr.

C. Direct Appeal

Petitioner admits he has not filed any direct appeals from the Court's judgment on February 16, 2007. ECF Dkt. # 314, Attach. 1 at 3.

D. 28 U.S.C. § 2255 Petition

On March 2, 2007, Petitioner filed the instant motion through counsel under 28 U.S.C. § 2255 in order to vacate, set aside, or correct his sentence. ECF Dkt. # 314. Petitioner raised four grounds for relief:

I. THE PLEA COLLOQUY WAS DEFICIENT UNDER RULE 11 FOR THE COURT'S FAILURE TO DETERMINE THAT THE PLEA WAS NOT COERCED.

II. MOVANT'S GUILTY PLEA WAS COERCED BY GOVERNMENT THREATS TO PROSECUTE MOVANT'S WIFE AND FORFEIT HER PROPERTY.

III. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PREPARE FOR TRIAL, FAILURE TO INVESTIGATE, FAILURE TO FILE NECESSARY MOTIONS, FAILURE TO INTERVIEW WITNESSES.

IV. TRIAL COUNSEL'S CONFLICT OF INTEREST.

ECF Dkt. # 314 Attach. 1 at 5-20. On August 17, 2007, Respondent filed a brief in opposition to Petitioner's motion. ECF Dkt. # 325. On November 7, 2007, Petitioner filed a reply brief. ECF Dkt. # 328. The Honorable Judge James S. Gwin referred the instant case to the undersigned for a Report and Recommendation. ECF Dkt. # 317.

II. STATEMENT OF THE PERTINENT LAW

Under 28 U.S.C. § 2255, a federal inmate is provided with a post-conviction means of collaterally attacking his conviction or sentence. *In re Gregory*, 181 F.3d 713, 714 (6th Cir.1999). Motions brought under § 2255 are the sole means by which a federal prisoner can collaterally attack a conviction or sentence that he alleges to be in violation of federal law. *See United States v. Davis*, 417 U.S. 333 (1974); *United States v. Cohen*, 593 F.2d 766, 770 (6th Cir.1979).

A. PROCEDURAL BARRIERS

Before a court can grant a 28 U.S.C. § 2255 motion on the merits, the petitioner must overcome procedural bars including the § 2255 statute of limitations and procedural default. In the case at bar, the Parties have not raised the § 2255 statute of limitations as an issue. *See* ECF Dkt. # 314, 325, 328.

Except for a claim of ineffective assistance of counsel, a federal prisoner's failure to raise a claim on direct appeal results in a procedural default of that claim. *Bousley v. United States*, 523 U.S. 614, 621 (1998); *Peveler v. United States*, 269 F.3d 693, 698 (6th Cir.2001); *Phillip v. United States*, 229 F.3d 550, 552 (6th Cir. 2000). Thus, for a federal prisoner to obtain review of a defaulted claim in a § 2255 motion, he must show cause to excuse his failure to raise the claim previously and actual prejudice resulting from the alleged violation. *Bousley*, 523

U.S. at 622; *Peveler*, 269 F.3d at 698-700; *Phillip*, 229 F.3d at 552. If the prisoner fails to establish cause, it is unnecessary to determine if he was prejudiced by the alleged violation. *Bousley*, 523 U.S. at 623. If the prisoner is unable to show cause and prejudice, he may still be able to obtain review of his claims if his case fits within a narrow class of cases permitting review in order to prevent a fundamental miscarriage of justice, as when he submits new evidence showing that a constitutional violation has probably resulted in a conviction of one who is actually innocent. *Bousley*, 523 U.S. at 622-23, citing *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *accord Peveler*, 269 F.3d at 698. The federal prisoner must also show that he is actually innocent of any more serious counts that were dismissed during plea bargaining. *Bousley*, 523 U.S. at 624; *Peveler*, 269 F.3d at 700.

B. STANDARD OF REVIEW

28 U.S.C. § 2255 sets forth four grounds upon which federal prisoners may challenge their conviction or sentence:

1. That the sentence was imposed in violation of the Constitution or laws of the United States;

2. That the court was without jurisdiction to impose such sentence;

3. That the sentence was in excess of the maximum authorized by law;

4. That the sentence is otherwise subject to collateral attack.

United States v. Hill, 368 U.S. 424. 426-27 (1962); 28 U.S.C. § 2255.

Motions to vacate, set aside, or correct a sentence pursuant to § 2255 must be filed in the trial court that sentenced the prisoner. 28 U.S.C. § 2255; *Gregory*, 181 F.3d at 714. In order to prevail on a § 2255 motion alleging constitutional error, the petitioner must establish that an error of constitutional magnitude existed that had a substantial and injurious effect or influence on the proceedings. *United States v. McNeil*, 72 F. Supp. 2d 801, 803 (N.D. Ohio 1999) citing *United States v. Watson*, 165 F.3d 486, 488 (6th Cir. 1999) citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-638 (1993). In order to prevail on a § 2255 motion alleging non-constitutional error, the petitioner must establish a "fundamental defect which inherently results in a complete miscarriage of justice, or, an error so egregious that it amounts to a violation of due process." *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir.1990) citing *United States v. Hill*, 368 U .S. 424, 428 (1968).

Pursuant to Rule 4 of the Rules Governing § 2255 Proceedings, a motion to vacate may be summarily denied if it plainly appears from the face of the motion and any annexed exhibits that the movant is not entitled to relief. *Smith v. United* States, 348 F.3d 545, 550 (6th Cir. 2003); *Baker v. United States*, 781 F.2d 85, 92 (6th Cir.1986).

Otherwise, the Court must hold an evidentiary hearing to determine the truth of movant's claims. *Valentine v. U.S.*, 488 F.3d 325, 333 (6th Cir. 2007) quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999). The Sixth Circuit has observed that a § 2255 petitioner's "burden 'for establishing an entitlement to an evidentiary hearing is relatively light.' " *Smith*, 348 F.3d at 550 quoting *Turner*, 183 F.3d at 477 (6th Cir. 1999). However, no hearing is required if the movant's allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact. *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir.1999); *Peavy v. United States*, 31 F.3d 1341, 1345 (6th Cir.1994).

C. WAIVER OF APPELLATE RIGHTS

A defendant may waive his right to bring a § 2255 motion. A defendant's knowing and voluntary waiver of his right to pursue collateral relief in a plea agreement will preclude his ability to file a subsequent § 2255 motion. *Davila v. United States*, 258 F.3d 448, 450 (6th Cir. 2001); *Watson v. United States*, 165 F.3d 486, 488-89 (6th Cir. 1999)."It is well settled that a defendant in a criminal case may waive 'any right, even a constitutional right,' by means of a plea agreement." *Davila*, 258 F.3d at 450-51 quoting *United States v. Fleming*, 239 F.3d 761, 763 (6th Cir.2001). To be a valid waiver the defendant must enter into the waiver agreement knowingly, intelligently, and voluntarily. *Davila*, 258 F.3d at

450-51 citing *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987).

III. ANALYSIS

The undersigned recommends that the Court deny the instant 28 U.S .C. § 2255 motion for the following reasons:

Since Ground One of the Petition requires analysis of the other three grounds, the undersigned will address the grounds for relief in the following order: Ground Two, Ground Three, Ground Four, and, lastly, Ground One.

A. Ground Two of the instant petition should be dismissed for lack of merit.

Petitioner alleges that his plea was not voluntarily made because it was the result of improper threats by the Government to prosecute his wife. ECF Dkt. # 314, Attach.1 at 11-12.[4/] In support of his claim, Petitioner submits: (1) a self-serving declaration stating that Attorney Price informed him that the Government had threatened to prosecute his

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4 Petitioner also alleges that Attorney Price had severe conflicts of interest resulting from Attorney Price's failure to prepare for trial and from Attorney Price's purported representation of movant's wife. ECF Dkt. # 314, Attach. 1 at 13-15. It is unclear why Petitioner has placed these arguments unrelated to the Government's actions under the head "Movant's guilty plea was coerced by government threats to prosecute movant's wife." To avoid confusion, the undersigned will address these arguments only under Grounds Three and Four.

wife, Tracie Adams ("Tracie" or "Tracie Adams") for money structuring or laundering if Petitioner did not enter the proposed plea agreement; and (2) an unattested declaration from Tracie Adams stating that Attorney Price told her that "they were going to come after [her]" if Petitioner did not enter the Plea Agreement. See *ECF* Dkt. # 314, Attach. 1 (Tracie Adams Declaration Attached); ECF Dkt. # 328 (Frank Adams Declaration Attached).

Petitioner's evidence is plainly contradicted by the record. The Plea Agreement that Petitioner signed stated, "The defendant acknowledges that his offer to plead guilty is freely and voluntarily made and that *no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Plea Agreement, to induce him to plead guilty.*" ECF Dkt. # 241 at 16 (emphasis added).

Petitioner claims that Attorney Price told him not to inform the Court of the Government's promise not to indict Tracie. ECF Dkt. # 328 (Frank Adams Declaration Attached); ECF Dkt. # 314 at "Attachment page 5." That claim is contradicted by the record as well. Both Attorney Price and Lori A. Hendrickson (Special Assistant U.S. Attorney) signed the Plea Agreement as officers of the Court representing that no outside threats or promises had been made to induce Petitioner to plead guilty. *See* ECF Dkt. #241 at 17-18. More specifically, Attorney Price signed a statement, incorporated in the Plea Agreement, which reads, "No assurances, promises, or representations have been given to me (defense counsel) or the defendant by the United States or by

any of its representatives which are not contained in the written agreement."*Id.* at 17. Moreover, a review of the record of the change of plea proceedings shows no reference to any promise by the Government not to indict Tracie. *See* COP Tr.

Although it is not part of the record, Respondent's brief in opposition to the instant petition further illuminates the issue. Respondent contends that the Government never promised to forego prosecuting Tracie Adams if Petitioner entered the Plea Agreement. ECF Dkt. # 325 at 11. Respondent asserts that the Government did discuss prosecuting Tracie Adams if *she* did not agree to forfeit the property that was involved in her husband's criminal case. *Id.* Respondent's contentions are entirely consistent with the record, and the declarations Petitioner has presented are not.

Since the record contradicts Petitioner's claim and his supporting evidence, the undersigned finds that no evidentiary hearing is necessary. See *Arredondo*, 178 F.3d at 782. The undersigned further finds that the Government never threatened to prosecute or promised not to prosecute Tracie Adams in exchange for Petitioner's Plea Agreement. Consequently, Petitioner has failed to carry his burden of establishing that a deficiency in the Court's colloquy had a substantial and injurious effect or influence on the proceedings for failing to uncover the purported coercion by the Government. For these reasons, the undersigned recommends that the Court deny Ground Two of the instant petition due to a lack of merit.

B. Ground Three of the instant petition should be dismissed for lack of merit.

Petitioner alleges that Attorney Price was ineffective for his "failure to prepare for trial, failure to investigate, failure to file necessary motions, [and] failure to interview witnesses."ECF Dkt. # 314 at 8. Petitioner has the burden of establishing that "(1) his attorney's performance was outside the range of competence demanded of attorneys in the criminal context, and (2) the professionally unreasonable performance prejudiced him." *Hunter v. United States*, 160 F.3d 1109, 1115 (6th Cir. 1998); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984).

With regard to the "deficient performance" prong, the U.S. Supreme Court has said that, "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

In order to satisfy the "prejudice" requirement for a claim of ineffective assistance of counsel in the context of a change of plea, Petitioner must show that there is a reasonable probability that, but for Attorney Price's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill* 474 U.S. at 58. This assessment will depend in large part on a prediction whether the evidence would have been likely to change the outcome of a trial. *Id.*

Petitioner has not met his burden because he has made absolutely no showing of prejudice. He has not identified any exculpatory or mitigating evidence Attorney Price should have obtained from an investigation or witness interviews. *See* ECF Dkt. # 314, 328. Petitioner states "courts have found ineffective assistance of counsel when defense counsel has failed to competently prepare for trial by inadequate pre-trial investigation into possible leads *that would have helped the defense.*" ECF Dkt. # 314, Attach. 1 at 17 (emphasis added). Petitioner claims Attorney Price failed to locate and interview percipient witnesses. *Id.* at 18-19. Even assuming Petitioner's statements of the law and his assertions of fact are true, he has failed to show how the witnesses would have helped his defense. Although Petitioner alleges that he would not have pled guilty if Attorney Price had conducted these witness interviews, the undersigned finds his allegation to be meritless in light of Supreme Court precedent. In *Hill*, the Supreme Court stated:

> Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial ... Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the Strickland v. Washington test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim.

474 U.S. at 59. In this case, Petitioner has not identified any exculpatory evidence that he claims would have affected his decision to plead guilty. The undersigned fails to see how Petitioner can claim he would not have pleaded guilty when he has not identified any beneficial evidence that would have affected his decision. Consequently, the undersigned finds Petitioner's allegation to be conclusory, incredible, and, therefore, meritless.

The same is true of Petitioner's contention that Attorney Price failed to file substantive motions. Petitioner has not identified what evidence should have been suppressed, nor has he demonstrated the merit of the motions Attorney Price allegedly failed to pursue, nor has he demonstrated how exclusion of that evidence would have affected the strength of the Government's case. Petitioner only states:

> Other than filing perfunctory motions to suppress the evidence seized from the airport stop and search in 2000, the Oklahoma vehicular stop and search, and supplemental points and authorities in support of movant's joinder in co-defendant's Mendoza's motion to suppress the stop and search of the semi-tractor trailer in 2004, movant's trial counsel failed to file any other substantive motions in the case. He did not file any wiretap motions and counsel's main effort were [sic] his motions to continue the trial.

ECF Dkt. # 314, Attach. 1 at 19. Petitioner's assertion has left the Court to speculate as to what specific motions Petitioner believes Attorney Price should have filed, what arguments he believes would have been likely to prevail, and what impact, if any, the exclusion of this unidentified evidence would have had on the Government's case. Petitioner has the burden of demonstrating the merit of these motions. *See United States v. Sanders*, 165 F.3d 248, 253 (3rd Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."); *United States v. Tisdale*, 195 F.3d 70, 73-74 (2d Cir.1999) ("Trial counsel's failure to bring a meritless suppression motion cannot constitute ineffective assistance."); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir.1993) ("[t]he Sixth Amendment does not require counsel ... to press meritless issues before a court"). Without showing that there was some likelihood of success for the foregone motions, Petitioner has given the Court no basis for concluding that Attorney Price's performance was deficient or prejudicial. Consequently, the undersigned recommends that the Court deny Ground Three of the instant petition due to a lack of merit.

C. Ground Four of the instant petition should be dismissed for lack of merit.

In Ground Four of the Petition, Petitioner argues that Attorney Price had two conflicts of interests, but he does not clearly articulate what the basis for relief should be. *See* ECF Dkt. # 314,

Attach.1 at 14. It is not clear whether Petitioner is seeking relief: (1) because ineffective assistance of counsel resulted from the conflicts of interests; (2) because the conflicts allegedly made his plea involuntary; or (3) both of the foregoing reasons. The undersigned will give Petitioner the benefit of the doubt and assume he is alleging both ineffective assistance of counsel arising from conflicts of interests and that Attorney Price coerced him into entering an involuntary plea in order to advance interests adverse to Petitioner.

Under the framework of ineffective assistance and coercion, the determinative question is the same: whether Petitioner would not have pleaded guilty and would have insisted on going to trial if the conflict/ineffective representation did not occur. *See Hill* 474 U.S. at 58. The American Bar Association's Model Rules of Professional Conduct ("MRPC") serve as a guide for evaluating the reasonableness of an attorney's representation. *See Strickland*, 466 U.S. at 687 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice ... are guides to determining what is reasonable, but they are only guides.") Under the MRPC, a conflict of interests exists when:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

> responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rules of Prof'l Conduct R. 1.7(a) (2007). The Model Rules of Professional Conduct further provide:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Model Rules of Prof'l Conduct R. 1.7(b) (2007).

(i) Attorney Price's purported conflict between Tracie Adams and Petitioner.

Petitioner first alleges that Attorney Price had a severe conflict of interest resulting from Attorney Price's purported representation of Petitioner's wife. ECF Dkt. # 314, Attach. 1 at 13-15. Petitioner has failed to meet his burden of establishing that a conflict did in fact exist. In support of his claim, Petitioner points to Tracie Adams' declaration, a signed forfeiture agreement between Tracie Adams and the Government, and Petitioner's own declaration. ECF Dkt. # 314, Attach. 1 at 13-15; # 328. The undersigned will address each piece of evidence separately.

Tracie Adams' declaration does not show that Attorney Price ever represented her. Tracie states:

A couple of days before Frank Adams' trial was scheduled, Mr. Price told me that I needed to sign an agreement between myself and the government not to contest the forfeiture of property and that it was a part of the government's plea bargain with Frank. *I asked Cornell if I should get my own attorney to advise me whether I should sign the property over. Mr. Price told me that I didn't need an attorney. He advised that I had to sign off on the property for Frank because of California's community property laws.* I relied on Mr. Price's advice that I did not need an attorney and signed over the property at his recommendation.

ECF Dkt. # 314 (Tracie Adams Declaration at ¶ 7) (emphasis added). First, the undersigned notes that Tracie Adams' declaration is unattested and, therefore, falls short of establishing the identity of the declarant. Even assuming the declarant was in fact Petitioner's wife, Tracie's declaration shows that she did not believe Attorney Price represented her, as evidence by her statement: "I asked Cornell if I should get my own attorney ..." Further it shows that Attorney Price did not hold himself out to be her attorney. He told her she did not need an attorney, and he did not state that he was representing her interests. Moreover, he told her that she would have to sign off on the property for Petitioner (not for her own benefit). This fact is supported by Petitioner's assertion that "[o]btaining movant's wife's signature on the document agreeing to forfeiture of allegedly co-owned property was a condition of movant's guilty plea." ECF Dkt. # 314, Attach. 1 at 15. Lastly, by her own admission, Tracie states that she relied on Attorney Price's advice that she could sign the forfeiture agreement *without representation*. ("I relied on Mr. Price's advice that I did not need an attorney ...")

If Attorney Price's performance was deficient in any respect, it was for failing to advise Tracie Adams of the desirability of seeking independent counsel to represent her interests. *See* Model Rules of Prof'l Conduct R. 4.3 (2007).[5] Even if Attorney

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5 "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a

Price had violated Rule 4.3, he did so in furtherance of Petitioner's interests and to Tracie Adams' detriment. Therefore, Tracie Adams' declaration does not establish that Attorney Price ineffectively represented Petitioner's interests or that Petitioner was prejudiced by any ineffective representation.

The agreement between Tracie Adams and the Government does not demonstrate that Attorney Price ever worked in a representative capacity for Tracie Adams. The agreement was captioned for Petitioner's criminal case, filed in Petitioner's case, and signed by Petitioner's attorney. See ECF Dkt. # 243, Attach. 2. There is no indication that Attorney Price signed the agreement in any capacity other than that of counsel for Petitioner. *See id.*

Petitioner's declaration also does not establish that Attorney Price represented Petitioner's wife. Petitioner states:

I know that the judge did not know that Mr. Price also represented my wife in getting her to agree to forfeit her interest in properties. I was never advised that Mr. Price's representation of my wife in my case could be a conflict of interest. The judge was never informed that Mr. Price represented both me and Tracie.

ECF Dkt. # 328 (Frank Adams Declaration at ¶ 8). Nothing in Petitioner's statement indicates that

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person are or have a reasonable possibility of being in conflict with the interests of the client."

Attorney Price represented Tracie Adams and advocated for her interests as opposed to convincing her to sign the forfeiture agreement in furtherance of Petitioner's own interests (entering the Plea Agreement, receiving a Guideline reduction for acceptance of responsibility, and foreclosing the Government from arguing for a sentence of 30 years to life imprisonment at the sentencing hearing).See ECF Dkt. # 241 at 4-7; SH Tr. at 16. Petitioner's statement that Attorney Price represented Tracie Adams is conclusory because it points to no supporting facts. Therefore, it is entitled to no deference.

Even assuming *arguendo* that Petitioner's assertion is true and Attorney Price did represent both Petitioner and Tracie Adams, Petitioner's own declaration shows that he was aware of any conflicting interests Attorney Price had. Petitioner claims he was aware of the Government's purported promise not to indict Tracie, and he "plead guilty because [he] was worried about Tracie and the children and what would happen to them if Tracie would be arrested." *Id.* at ¶ 5. Again, assuming his assertions are true, Petitioner was fully aware of the competing interests, and he made a personal choice to enter the Plea Agreement so his wife would receive favorable treatment. Petitioner has essentially admitted that his interests and Tracie's interests were aligned. Therefore, he has failed to show that Attorney Price's representation was inadequate or prejudicial. In other words, he has not demonstrated that he would not have sought to protect his wife's interests absent Attorney Price's representation.

(ii) Attorney Price's purported personal conflict from his lack of trial preparation.

Petitioner also alleges that Attorney Price had a severe conflict of interest resulting from Attorney Price's failure to prepare for trial. ECF Dkt. # 314, Attach. 1 at 14-15. Again, Petitioner has failed to meet his burden of establishing that a conflict existed and prejudiced his case. Petitioner claims that "Mr. Price, by his own admission, was not prepared for trial." *Id.* That assertion does not establish a significant risk that the representation of Petitioner would be materially limited by a personal interest of Attorney Price. Even assuming Petitioner's assertion is true and Attorney Price was not prepared for trial, Petitioner has made no showing that Attorney Price advanced his personal interests over Petitioner's personal interests. Petitioner has not even identified what personal interest Attorney Price was protecting. Furthermore, there is nothing in the record to suggest that Attorney Price put his own interests in front of Petitioner's while counseling him to enter the Plea Agreement. Instead of pointing to evidence establishing that Attorney Price acted to protect his personal interests, Petitioner states that he "was pressured to plead guilty both by Price ... and his wife," totally ignoring any pressure resulting from the threat of a potential sentence for 30 years to life. Petitioner has not demonstrated how Attorney Price pressured him to sign the Plea Agreement. For these reasons, the undersigned finds Petitioner's

allegations to be conclusory, incredible, and, therefore, meritless.

Consequently, the undersigned recommends that the Court deny Ground Four of the instant petition due to a lack of merit.

D. Ground One of the instant petition should be dismissed.

Petitioner claims that the Court failed to address him in open court to determine whether his plea was voluntary as Federal Rule of Criminal Procedure 11(b)(2) requires. ECF Dkt. # 314, Attach. 1 at 8. Petitioner further claims, "It is 'clear and obvious' that movant's substantial rights were affected by the Court's failure to inquire in the voluntariness of his plea in the [sic] he had been coerced into the plea agreement based on the government's promise his wife would not be indicted or her assets forfeited if he pled guilty."*Id.*

The determinative questions with respect to Ground One are: (1) whether Petitioner's plea was voluntarily made; and (2) whether the Court conducted a deficient colloquy resulting in a failure to ascertain the involuntary nature of the plea.

(i) Ground One is procedurally barred.

Petitioner's claim is procedurally barred because he signed a plea agreement waiving his right to attack his conviction on a 28 U.S.C. § 2255 motion

except for challenges to a sentence in excess of the maximum sentence or the applicable Sentencing Guideline range or for claims of ineffective assistance of counsel or prosecutorial misconduct. ECF Dkt. # 241 at 10; see *Davila*, 258 F.3d at 450; *Watson*, 165 F.3d at 488-89. While such a waiver must be voluntarily made, Petitioner carries the burden of showing involuntariness. *See Bousley*, 523 U.S. at 618-19 (if proven, an involuntary or unintelligently made plea of guilty is constitutionally invalid). In this case, Petitioner has fallen short of that burden because he signed the Plea Agreement which stated that the offer to plead guilty was freely and voluntarily made and his contention that he was coerced into signing the Plea Agreement is plainly contradicted by the record, as shown below in subsection (ii). *See* ECF Dkt. # 241 at 16. Consequently, the Court should enforce the waiver and deny Ground One of the instant petition.

(ii) Ground One lacks merit.

Petitioner's claim also lacks merit. Petitioner has the burden of establishing that a deficiency in the Court's colloquy had a substantial and injurious effect or influence on the proceedings. *See Bousley*, 523 U.S. at 618-19; *United States v. McNeil*, 72 F. Supp.2d at 803 (setting forth burden for establishing an error of constitutional magnitude). Here, Petitioner first claims the injurious effect is that the Court failed to ascertain the Government's coercion and consequently accepted an involuntary plea. ECF Dkt. # 314, Attach. 1 at 8. Second, Petitioner argues that his plea was not intelligently and voluntarily

made because Attorney Price was ineffective for misrepresenting the Government's plea offer to Petitioner in stating that the Government would promise not to indict Tracie Adams if Petitioner signed the Plea Agreement.

ECF Dkt. # 328 at 8. Third, Petitioner argues that his plea was not voluntary because his attorney coerced him. ECF Dkt. # 314, Attach. 1 at 10, 14. Petitioner has failed to meet his burden because he has not presented sufficient evidence to establish that the Government promised not to indict his wife or that Attorney Price ever conveyed such a promise. Further he has failed to demonstrate that a conflict of interests existed.

First, as discussed above in section III(A) Petitioner's evidence in support of his claim that the Government coerced him contradicts the record, and the undersigned finds that the Government never threatened to prosecute or promised not to prosecute Tracie Adams if Petitioner did not sign the Plea Agreement. Therefore, Petitioner has failed to carry his burden of establishing a substantial and injurious effect or influence on the proceedings resulting from the Court's alleged failure to uncover coercion by the Government.

Second, Petitioner's assertion that ineffective assistance of counsel resulted in an involuntary plea is also contradicted by the record. Again, the *Strickland* standard applies to Petitioner's claim. Petitioner alleges that Attorney Price's performance was outside of the range of competence demanded of

attorneys in the criminal context because Attorney Price misrepresented the Government's promises. ECF Dkt. # 328 at 8. As discussed above, the undersigned finds that the Government did not promise to forego prosecuting Tracie Adams in exchange for Petitioner's plea of guilty. The undersigned also finds that the record plainly contradicts Petitioner's assertion that Attorney Price informed him of a promise outside of the Plea Agreement because both Petitioner and Attorney Price signed the Plea Agreement acknowledging that it contained the "full and complete terms and conditions of the agreement" between Petitioner and the Government. ECF Dkt. # 241 at 16-17. Since Petitioner has failed to demonstrate that Attorney Price ever represented that the Government promised not to prosecute (or threatened to prosecute) Tracie in exchange for Petitioner's guilty plea, Petitioner has failed to meet his burden of establishing that Attorney Price's performance was outside the range of competence demanded of attorneys in the criminal context.

Third, with regard to Petitioner's argument that his attorney coerced him, the undersigned finds his argument to lack merit because Petitioner has failed to establish that a conflict of interests did in fact exist. The reason for this conclusion are fully articulated above in section III(C).

For the foregoing reasons, the undersigned recommends that the Court deny Ground One of the instant petition as procedurally barred, or in the

alternative, deny Ground One of the instant petition due to a lack of merit.

IV. CONCLUSION

For the foregoing reasons, the undersigned recommends that the Court DENY Ground One as procedurally defaulted, or in the alternative, due to a lack of merit; and DENY Grounds Two, Three, and Four due to a lack of merit.

Date: December 26, 2007

/s/George J. Limbert
GEORGE J. LIMBERT
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES, Plaintiff-Respondent,

vs.

FRANK AARON ADAMS, Defendant-Petitioner.

CASE NO. 1:05-CR-00126-JG
Judge James S. Gwin

NOTICE OF APPEAL
FILED: May 30, 2008

NOTICE IS HEREBY GIVEN that Frank Aaron Adams, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the District Court's Opinion & Order denying defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. §2255 [Doc. 314]. The District Court's Opinion & Order was entered in this action on April 2, 2008 [Doc. No. 333].

DATED: May 30, 2008

Respectfully submitted,

/s/ Robert J. Waters
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APPENDIX E

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §2253

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--(A) the final order In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rules of Criminal Procedure, Rule 11

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) **Advising and Questioning the Defendant.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * *

(2) **Ensuring That a Plea Is Voluntary.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

Federal Rules of Appellate Procedure Rule 22
(b) **Certificate of Appealability.**

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.